1978

Rochelle Ritchie Wilson v. Robert Gaines Wilson : Brief of Appellant

Utah Supreme Court

Strong & Hanni; Attorneys for Appellant;
Kay M. Lewis; Attorney for Respondent;

IN THE SUPREME COURT OF THE STATE OF UTAH

ROCHELLE RITCHIE WILSON,	)	
	)	
Plaintiff-Respondent,	)	
	)	
-vs-	)	Case No. 15277
	)	
ROBERT GAINES WILSON,	)	
	)	
Defendant-Appellant.	)	

BRIEF OF APPELLANT

APPEAL FROM A JUDGMENT AND ORDER
OF THE
THIRD JUDICIAL DISTRICT COURT
FOR SALT LAKE COUNTY, STATE OF UTAH

The Honorable G. Hal Taylor, Judge

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GORDON R. STRONG
(1900-1961)

December 1 , 1977

Honorable Justices
Utah Supreme Court
State Capitol Building
Salt Lake City, Utah

Re: Wilson v. Wilson
Supreme Court No. 15277

Dear Justices:

In the above-captioned case the trial transcript constitutes part of the record. However, this transcript is very confusing since it was not properly dated or arranged by the district court reporters. Therefore, the purpose of this letter is to alleviate potential confusion which might result as you read through the transcript.

This case actually came on for trial on the 14th and 17th days of January, 1977 and on the 11th day of February, 1977. Thus, the title page of that portion of the transcript bound in the red binder is incorrect and misleading. Pages 1 thru 73 of the red binder actually contain the transcript for the first day of trial, January 14th. A transcript of the next day of trial, January 17th, is contained in the green binder. Finally, the transcript for the third and final day of trial, February 11, 1977, is contained in pages 74 thru 102 of the red binder.

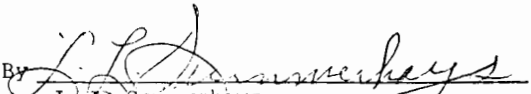
Thus, in order to read the transcript of this case in its proper chronological order, pages 1 thru 73 of the red trial transcript should first be read, then pages 1 thru 73 of the green trial transcript should be read and finally pages 74 thru 102 of the red trial transcript should be read.

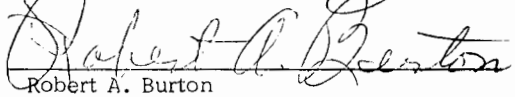
Since there were two reporters involved in making up the transcript and since these reporters did not number the pages consecutively; defendant-appellant in his brief has indicated which trial transcript--red or green-- he is quoting from or using as authority.

Although the trial transcripts are not properly arranged, they do appear to be complete in all respects.

Very truly yours,

STRONG & HANNI

By 
L. L. Summerhays

By 
Robert A. Burton

RAB:lge

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IN THE SUPREME COURT OF THE STATE OF UTAH

ROCHELLE RITCHIE WILSON, Plaintiff-Respondent, -vs- ROBERT GAINES WILSON, Defendant-Appellant.	)	Case No: 15277

BRIEF OF APPELLANT

NATURE OF THE CASE

This appeal arises out of a divorce action. Defendant-appellant does not contest the Decree of Divorce itself. However, he is contesting the property division and alimony award ordered by the Trial Court. Defendant maintains that the property awarded plaintiff-respondent, his former wife, was excessive in amount and was not warranted by the evidence; furthermore, the permanent alimony award to plaintiff of $900.00 per month was excessive both in amount and duration.

STATEMENT OF THE FACTS

On August 27, 1969, plaintiff and defendant were married in Salt Lake City, Utah. This was a second marriage for both persons. Defendant had two sons by his previous marriage, both of whom presently reside in North

Carolina with their mother. Defendant is obligated to pay $500.00 per month in child support for the maintenance of these two boys.[1] In addition he is obligated to maintain a $20,000.00 life insurance policy on his life with his two sons as joint beneficiaries; maintain health insurance on both sons; provide funds for all education that either son may need or desire beyond high school to and including graduate and professional schools.[2]

Plaintiff also had two children, a son and a daughter by a previous marriage. The ages of these children were twelve and ten, respectively, when plaintiff and defendant were married. The daughter, Kelly, resided with plaintiff and defendant during almost the entire course of their marriage. Trey, the son, lived for over a year with the parties. Defendant provided the sole support for these children during this period with the exception of $50.00 per month which each child received as child support from plaintiff's former husband.[3] Defendant was a generous provider. Besides giving each child complete medical and dental care and a private room, bath and furniture, he provided, among other things, the following: bicycles, stereos, ski equipment, numerous trips, private dancing lessons,

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1 Green TR. p. 40.

2 Green TR. p. 41.

3 Red TR. p. 49.

private diving lessons, ski lessons, private tutors, psychological testing.[4]

When the parties were married, plaintiff did not bring any assets into the marriage excepting a few household items - pots, pans, some dishes and silver, sewing machine, washer and dryer.[5] On the other hand, defendant contributed substantial assets to the marriage. These assets included the following: 1969 automobile with a value of $3,500.00,[6] down payment on a home in the sum of $15,000.00.[7] (When the house was sold, defendant's $15,000.00 was then used to partially finance the purchase of the condominium in which the parties then resided); four monthly payments on the parties' home totaling $2,000.00.[8] (This money was also subsequently invested in the condominium). Office equipment valued at $2,000.00.[9]

Although prior to the parties' marriage, plaintiff had been employed as a doctor's assistant and as a licensed expert technician,[10] she never worked during the marriage despite the fact that defendant had encouraged

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4 Green TR. pp. 39-40.

5 Red TR. p. 50.

6 Green TR. p. 28.

7 Defendant's testimony at trial was that he had made a down payment of approximately $10,000.00. (Green TR. p. 28) However, Exhibit "A" to defendant's Memorandum of Law establishes that defendant actually paid in excess of $15,000.00 for this down payment. (R. p. 91)

8 Green TR. p. 29.

9 Green TR. p. 48.

10 Red TR. p. 48.

her to do so on numerous occasions. For example, defendant testified as follows:

> "Q. Did she work at all during the marriage?
>
> "A. No.
>
> "Q. Did you have any discussions with her about working?
>
> "A. Yes . . . On many occasions we discussed the possibility of her working. She did not have enough to occupy her time. Was always wondering what to do with her time and I suggested she regain herself as an x-ray technician and when she rejected that idea, I asked if she would like to be employed as a pottery helper or art instructor or feeling that she could help me in the office part time. All of these discussions were held in an on-going manner throughout the marriage.
>
> "Q. And did she endeavor to do any of these?
>
> "A. No.
>
> "Q. Did she ever say why?
>
> "A. No, she just didn't want to."[11]

Plaintiff contributed absolutely nothing of a monetary nature to the accrual of the estate of plaintiff and defendant.

During the course of their marriage defendant worked unceasingly. Through his diligent efforts he was able to accumulate the property which forms part of the subject matter of this appeal.

On April 1, 1976, approximately six years and seven months after the marriage of Dr. and Mrs. Wilson, Mrs. Wilson filed her complaint

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11 Green TR. pp. 32-33.

seeking a divorce, alimony of $1,000.00 per month, and an equal division of all real and personal property which Dr. Wilson brought into the marriage and which he was able to accumulate during the tenure of the marriage.[12] She did not seek child support since no children were ever born to the plaintiff and defendant.

From the date of the filing of this action until after the trial court rendered judgment in May of 1977, defendant paid plaintiff the following amounts: $1,200.00 cash; $1,000.00 which he left in the checking account; all household bills; an airline ticket to North Carolina worth $286.00; $400.00 in psychiatric bills for plaintiff; $250.00 cash.[13] In addition defendant paid plaintiff $6,200.00 so she could purchase a new automobile; he paid her temporary alimony at $650.00 per month since June of 1976 for a total sum of $7,800.00; and he allowed her exclusive occupancy of the condominium.[14]

While defendant was making the aforementioned payments, he resided alone in a small apartment.

On January 14, 17 and February 11, this case came on for trial before the Honorable G. Hal Taylor. After the trial had concluded the court granted plaintiff a divorce and announced a property distribution. The property

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12 R. p. 2.

13 Plaintiff has not disputed that these payments were made. They are summarized in defendant's Affidavit to the trial court. (R. p. 17)

14 Trial court's Order of Temporary Support. (R. pp. 25-26)

was distributed as listed below. As might be expected in a case of this nature, conflicting evidence was offered as to the value of the respective items of property. For purposes of this brief, defendant is giving plaintiff the benefit of the doubt and is accepting her valuations for most of the property listed below. Documentation and explanation of these values can be found in the footnotes.

PROPERTY AWARDED PLAINTIFF		VALUE
A.	Condominium at 6066 South 1480 East, Salt Lake City, Utah	$ 80,000.00[15]
B.	Three lots in North Carolina	12,000.00[16]
C.	Plaintiff's automobile	6,200.00[17]
D.	Diamond ring	6,000.00[18]
E.	Stoneware	400.00[19]

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15 Red Tr. p. 37, P. Ex. 15, D. Ex. 21. This condominium was described at trial as follows:

> "It is a 2-story condominium in Village Three. It has approximately 3100 square feet, out garage and patio. It has upstairs; a living room, dining room, kitchen with bar, large master bedroom, private bath and closet, a second full bath upstairs, study, a laundry room. And downstairs is a large finished bedroom with private bath and closet, another finished bedroom and a medium-size family room, plus a large workshop area, semi-finished."

16 P. Ex. 15.

17 R. p. 25.

18 D. Ex. 19.

19 P. Ex. 13.

F.	Furniture in condominium with the exception of the items specifically awarded to the defendant	6,896.00[20]
G.	Personal items	None[21]
H.	$2,000.00 from defendant's 1976 income tax refund	2,000.00[22]

PROPERTY AWARDED DEFENDANT		VALUE
A.	Interest in profit sharing trust	$100,000.00[23]
B.	Partnership interest	30,000.00[24]
C.	Interest in professional corporation	15,636.73[25]

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20 Red TR. p. 71, P. Ex. 14. Plaintiff's attorney agreed that plaintiff had valued the personal property in the condominium at $8,316.00. From this figure $1,420.00 was subtracted since defendant was awarded personal property which plaintiff herself had valued at $1,420.00. Presumably the $6,896.00 figure included the value of the man's chest and the corner table which were awarded plaintiff and which were specified separately in the divorce decree. (R. p. 130)

21 There was no testimony as to the value of these items and said items were not specified.

22 Absolutely no evidence was introduced at trial to warrant the award of this sum to plaintiff.

23 Red TR. p. 29, wherein it was stated that defendant's interest in the trust was 80% of $125,000.00. Defendant, however, disputes this valuation as will be discussed below.

24 P. Ex. 10 through 12 and Red TR. p. 28.

25 Plaintiff's Ex. 9, Red TR. p. 11. This $15,636.73 figure includes the value of defendant's automobile, filing drawer and desk, naugahyde stool, lamp, suedechairs, bookcase, etagere. See P. Ex. 9 and Red TR. pp. 21, 59, 61, 63.

D.	Cattle	$ 6,200.00[26]
E.	Rocks and equipment	10,635.00[27]
F.	Ranch in North Carolina	10,000.00[28]
G.	Cottonwood Country Club membership	1,000.00[29]
H.	Beach Mountain lot	None[30]
I.	Trailer	700.00[31]
J.	Sheep horns	None[32]
K.	Fish trap tables	20.00[33]
L.	Bronze goblets, plates and flatware	127.00[34]
M.	Money in bank accounts	2,531.92[35]

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26 Red TR. pp. 72,73.

27 Defendant disputes this valuation. In plaintiff's opinion the rocks and equipment are worth $2,960.00. See D. Ex. 21.

28 P. Ex. 15. Defendant valued his interest in this ranch at $3,000.00. See D. Ex. 21.

29 R. p. 92. Red TR. p. 75.

30 Neither party offered any evidence as to the value of plaintiff's equity in this lot. See P. Ex. 15, D. Ex. 21.

31 D. Ex. 21.

32 No evidence was offered by either party as to the value of these horns.

33 P. Ex. 14.

34 P. Ex. 13.

35 Plaintiff listed the value of defendant's bank accounts at $28,531.92. However, from this figure must be subtracted the $20,000.00 which defendant was required to repay his father's estate. Green TR. pp. 25, 26. (And the $6,000.00 which he placed in an educational trust fund for the benefit of his two sons by the former marriage.) Green TR. p. 41.

N. 1976 tax refund except $2,000.00 which was paid plaintiff $ 9,399.00[36]

O. Personal items None[37]

When the foregoing figures are added up they show that plaintiff received property with a value of $104,600.00. Defendant received property of a total value of $176,850.65, if one considers the value of his profit sharing trust at a full $100,000.00 and if the 1976 tax refund is also included.[38]

As stated, plaintiff also received the sum of $17,136.00 from defendant prior to the entry of the final divorce decree on May 6, 1977. When this figure, minus the $6,200.00 which she spent for her new automobile, is added to the monetary value of plaintiff's property settlement, it is apparent that at the time the divorce was granted, plaintiff had received property and payments totaling the sum of $115,536.00.

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36 Defendant maintains that this refund should not be considered as a portion of the marital estate since absolutely no evidence was offered concerning it at trial. The only reference at all concerning it occurred in an Addendum to Plaintiff's Memorandum to the Trial Court submitted almost two months after the trial had concluded. (R. p. 120)

37 No evidence whatsoever was offered concerning what these items consisted of or their value.

38 Defendant maintains that the trust fund should have been valued at most at $50,000.00 and that the 1976 tax refund should not have been considered as part of the marital estate by either party. Taking these factors into account, the total value of defendant's property distribution is $117,451.65.

This was not all that plaintiff was granted by the trial court. She was also awarded attorney's fees in the sum of $6,000.00. In addition, she received a permanent award of alimony in the sum of $900.00 per month. At the date of the trial plaintiff was 40 years old. If one assumes that she draws alimony at the present rate until she is 65 years of age, her total alimony award would be in excess of $270,000.00.

POINT I.

THIS COURT HAS AN OBLIGATION TO REVIEW THE EVIDENCE AND TO CORRECT ANY INEQUITIES RESULTING FROM THE TRIAL COURT'S JUDGMENT.

The Utah Supreme Court has often expressed the thought recently articulated in the following dicta from Searle v. Searle, 522 P.2d 697 (Utah 1974) wherein the court stated:

> "Although it is both the duty and prerogative of this court in a case of equity to review the facts as well as the law, Article VIII, Section 9, Constitution of Utah, the trial judge has considerable latitude of discretion in adjusting the financial and property interests in a divorce case."

See also, Tsoufakis v. Tsoufakis, 14 Utah 2d 273, 382 P.2d 412 (1963) wherein the Utah court stated:

> "Although a divorce case is equitable in nature, and this court will review the evidence and may substitute its judgment for that of the trial court under proper circumstances, it will not disturb a trial court's judgment in the division of property or awards of alimony and child support unless it appears to be unjust and inequitable and therefore an abuse of discretion. Whether the awards of the division of property is unjust or inequitable

must necessarily depend upon the facts and circumstances in each particular case."

However, a review of Utah cases decided within the last forty years indicates the Utah court not only carefully reviews the evidence but it also often substitutes its judgment for that of the trial court in alimony and property distribution matters. A partial listing of authorities reads as follows: Dubois v. Dubois, 29 Utah 2d 75, 504 P.2d 1380 (1973) (Court disallows alimony award of $375.00 per month); Martinett v. Martinett, 8 Utah 2d 202, 331 P.2d 821 (1958) (Supreme Court reduces an excessive property award which the trial court granted plaintiff); Dehm v. Dehm, 545 P.2d 525 (Utah 1976) (Supreme Court reduces wife's alimony from $300.00 per month to $1.00 per month); Porter v. Porter, 109 Utah 444, 166 P.2d 516 (1946) (Supreme Court reduces alimony award from $40.00 per month for two years to $40.00 per month for six months); Hampton v. Hampton, 80 Utah 570, 47 P.2d 419 (1935) (Supreme Court reduces award of alimony which trial court granted wife from $54.00 per month to $45.00 per month); Schuster v. Schuster, 88 Utah 257, 53 P.2d 428 (1936) (Supreme Court reduces an excessive alimony award to a lump sum of $1,500.00); Graziano v. Graziano, 7 Utah 2d 187, 321 P.2d 931 (1958) (Decree granting wife a divorce was modified by striking award of alimony and attorney's fees); Wilson v. Wilson, 5 Utah 2d 79, 296 P.2d 997 (1956) (Supreme Court reduced defendant's $100.00 month payment period for alimony to forty-eight months); Felt v. Felt,

27 Utah 2d 130, 493 P.2d 620 (1972) (Supreme Court remanded the case for a new trial in order for the trial court to evaluate circumstances which might merit a reduction in alimony).

Numerous other Utah cases could be cited in which the Supreme Court held that circumstances warranted a modification of the trial court's award of property and alimony. In the present case those same circumstances exist and the trial court's decree should be modified.

POINT II.

THE PROPERTY DISTRIBUTION ORDERED BY THE TRIAL COURT WAS IMPROPER, HIGHLY INEQUITABLE TO THE DEFENDANT AND CONSTITUTED AN ABUSE OF THE TRIAL COURT'S DISCRETION.

A. Total value of property award was clearly excessive.

The Utah Supreme Court still endorses Pinion v. Pinion, 92 Utah 255, 67 P.2d 265 and McDonald v. McDonald, 120 Utah 573, 236 P.2d 1066 as establishing the guidelines to which the trial court should look when making property distribution awards in divorce cases. Ehninger v. Ehninger, 569 P.2d 1104 (Utah 1977).

In McDonald v. McDonald, Supra, Chief Justice Crockett prefaces his remarks concerning the relevant factors which the trial court should consider by stating:

> "During the writer's experience as a trial judge the opinion of Chief Justice Woolf in the case of Pinion v. Pinion, supra, was found helpful. Based on that pattern the following was

devised as a general formula for attempting to get all of the factors together in perspective and compare and evaluate them in adjusting the rights and obligations of the parties. All may not be present or important in every case but we apply them to the evidence herein."

After this introduction, Justice Crockett stated the relevant factors as follows:

"(1) the social position and standard of living of each before marriage . . .

"(2) the respective ages of each of the parties . . .

"(3) what each may have given up for the marriage . . .

"(4) what money or property each brought into the marriage . . .

"(5) the physical and mental health of the parties . . .

"(6) the relative ability, training and education of the parties . . .

"(7) the time and duration of the marriage . . .

"(8) the present income of the parties and the property acquired during marriage and owned either jointly or by each now . . .

"(9) how it was acquired and the efforts of each in doing so . . .

"(10) children reared, their present ages, and obligations to them or help which may in some instances be expected . . .

"(11) the present mental and physical health of the parties . . .

"(12) the present age and life expectancy of the parties . . .

"(13) the happiness and pleasure or lack of it, experienced during marriage . . .

"(14) any extraordinary sacrifice, devotion or care which may

have been given to the spouse or others, such as mother, father, etc., and obligations to other dependents having a secondary right to support . . .

"(15) the present standard of living and needs of each including the cost of living . . . "

A careful juxtaposition of the facts and circumstances of the instant against the fifteen factors above enumerated clearly shows that Mrs. Wilson property award of $115,536.00 was excessive in amount. For example, in relation to Factor No. 4, she has not brought any significant property into th marriage whereas the defendant brought into the marriage assets with a value exceeding $20,000.00.[39]

In relation to Factors 8 and 9, it must be noted that the property now held was all acquired solely through the efforts of defendant. Although defendant repeatedly suggested that plaintiff obtain some sort of part-time job, plaintiff refused to do so.[40]

With respect to Factor No. 10, it is important that no children were born to Dr. and Mrs. Wilson and the children of Mrs. Wilson by her first marriage are now both old enough to make a significant contribution to their own support and maintenance.

Factors 5 and 6 must also be evaluated. Plaintiff is in good health and as testified to at trial is capable of earning at least $750.00 a month as a doctor's licensed technician.[41]

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39 Id. Notes 5-9.

40 Id. Note 11.

41 Red TR. pp. 30-33.

In the instant case, Factor No. 7 is perhaps the most important factor to consider. Plaintiff and defendant were married but six years and seven months when this divorce action was brought. The duration of this marriage was simply too short to support such a huge property award as that granted by the trial court.

After diligent search, defendant has only been able to find three Utah divorce cases in which a property distribution was contested and in which the wife was awarded property valued in excess of the property awarded plaintiff in the instant case.[42] In each one of those three cases, compelling circumstances not present here justified such an award. For example, in Searle v. Searle, 522 P.2d 697 (Utah 1974) plaintiff got property valued at $205,150.00. However, the court accented the facts that the parties had been married over twenty-seven years and that plaintiff received absolutely no alimony.

In Dubois v. Dubois, 29 Utah 2d 75, 504 P.2d 1380 (1973), the court gave plaintiff sixty per cent of an estate valued at $588,581.00. However, the Supreme Court disallowed the $375.00 alimony award decreed by the trial court. Moreover, the court emphasized the fact that the parties had been married for thirty years and that almost all of the assets which defendant had invested to build his estate came from his plaintiff-wife.

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42 In Kline v. Kline, 544 P.2d 472 (Utah 1975), the parties stipulated that a $1,748,809.98 estate should be divided so that the husband received $931,602.63 and the wife received $743,387.35. This property division stipulation was approved on appeal.

In Weaver v. Weaver, 21 Utah 2d 166, 442 P.2d 928, the plaintiff-wif was awarded property valued at $375,000.00. However, she received no alimony and was required to pay her own attorney's fees. Moreover, again the court accented the fact that the parties had been married over thirty years and that the wife had worked extensively during the early years of the marriage to provide for her and her husband. The court also emphasized the fact that at the time of the divorce the wife was an invalid unable to work.

B. Plaintiff's award of $2,000.00 on defendant's 1976 tax refund finds absolutely no support in the evidence.

There was absolutely no evidence whatsoever submitted during the trial which would suggest or even intimate that plaintiff should be awarded this $2,000.00 sum. Apparently, on or about April 5, 1977, - almost two months after the trial in this case had concluded - plaintiff's attorney obtained a copy of defendant's 1976 income tax return which was submitted to him for his client signature. Plaintiff's counsel then filed a Memorandum with the trial court, attached the first page of defendant's tax return to that Memorandum and reque that the future tax refund be considered by the court in dividing the marital est

Without any oral argument and more importantly without a shred of evid

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43 See Addendum to plaintiff's April 5, 1977, Memorandum to the trial court. (R. p. 120)

or testimony being offered at trial, the District Judge awarded plaintiff $2,000.00 of this refund based solely on the request made in plaintiff's Memorandum.

C. Defendant's trust fund was not properly valued and resulted in an inflated value being placed on his entire share of the estate.

The trial court should not have considered defendant's interest in the trust fund as being worth $100,000.00 since the funds could not presently be withdrawn without destroying the plan.

Even if the funds could be withdrawn and the trust terminated on the day of plaintiff's divorce or at present, the following would result: The $100,000.00 in the pension trust would be considered income to Dr. Wilson for the year in which the trust was terminated. This $100,000.00 together with defendant's annual salary and other income of approximately $100,000.00 would make a $200,000.00 taxable income for the year involved. On the basis of Schedule Y, the applicable tax rate schedule for 1976, the taxes on $200,000.00 would be $125,490.00. One-half of this would be applicable to the pension trust income. This would amount to $62,745.00, leaving a net of $37,255.00 from the $100,000.00. Of course, defendant would probably have certain deductions which he could claim to reduce the tax somewhat, but it is clear that he would still be required to pay at least $50,000.00 in taxes on the $100,000.00 from the trust fund.

It is hornbook law that tax consequences must be taken into account

in any divorce property settlement award. Stern v. Stern, 66 N.J. 340, 331 A.2d 257; Kula v. Kula, 181 Neb. 531, 149 N.W.2d 430 (1967). Therefore, taking the above into account and subtracting from defendant's total property award the sum of $50,000.00 attributable to the trust fund and $9,399.00 attributable to the 197 tax refund it is apparent that defendant's property award was actually worth $117,451.65, whereas plaintiff's property award was $115,536.00. Considering all of the Pinion, Supra, and McDonald, Supra, factors above discussed, plaintiff's huge property settlement award constituted a blatant inequity to defendant.

D. Defendant's suggested remedy of inequitable property distribution.

Defendant recognizes that a number of items of personal and real property were distributed to the respective parties. An evaluation of the propriety of each separate conveyance of property would be an unduly burdensome and laborious task which this court should not be called upon to perform. Therefore, defendant respectfully requests that plaintiff be required to sell the condominium and divide the proceeds with defendant. Not only would this solution be the easiest for the court to work with, but it would also be best for plaintiff's interests.

The $80,000.00 condominium which consists of 3,100 square feet is far too large for plaintiff's needs or even her "reasonable" desires. With her share of the proceeds from the sale of the condominium she could purchase outright a smaller, yet very fashionable, and progressive home, apartment or

condominium which would better befit her life style. Her living expenses would then be reduced since she would not be required to light, heat, care for and maintain such an unduly large residence.

Defendant would also benefit since any decrease in plaintiff's living expenses should result in a concomitant decrease in his alimony payments. He would, of course, also be entitled to part of the proceeds from the sale of the condominium.

POINT III.

PLAINTIFF'S PERMANENT ALIMONY AWARD OF $900.00 PER MONTH WAS HIGHLY INEQUITABLE TO DEFENDANT AND CONSTITUTED AN ABUSE OF DISCRETION BY THE TRIAL COURT.

The award of alimony granted plaintiff is far higher than any other reported award of alimony ever approved by the Utah Supreme Court. Furthermore, the permanence of the award makes it especially egregious to defendant.

It is clear from the McDonald and Pinion decisions that the same factors governing property settlements also govern the award of alimony. The same arguments made under Point II with respect to the inequity of the property distribution are also fully applicable in the alimony context. However, when an award of alimony is bei ng contemplated as contrasted with a property distrubtion, two factors stand out as being of paramount importance. One, the needs of the spouse to whom alimony will be awarded. Carter v. Carter, 563 P.2d 177 (Utah 1977); Dehm v. Dehm, 545 P.2d 525 (Utah 1976); Barrett v. Barrett, 17 Utah 2d 1, 403 P.2d 649 (1965); Alldredge v. Alldredge, 119 Utah

504, 229 P.2d 681 (1951). Two, the duration of the marriage. Frank v. Frank, 18 Utah 2d 228, 419 P.2d 199 (1966); Barrett v. Barrett, Supra; Anderson v. Anderson, 104 Utah 104, 138 P.2d 252 (1943); Pinion v. Pinion, 92 Utah 255, 67 P.2d 265 (1937); Schuster v. Schuster, 88 Utah 257, 53 P.2d 428 (1936).

A. Needs of Spouse.

Barrett v. Barrett, Supra, deals with a remarkably similar fact situation and forcefully illustrates that a wife's alimony should not be greater than her needs. In this case, the trial court granted the plaintiff-wife a divorce and awarded her $250.00 in monthly alimony payments, $200.00 in child support payments, and a $15,000.00 property settlement. However, the court required her to reconvey to defendant a diamong ring worth $9,500.00 which her defendant husband had purchased for her. Although the defendant-husband had a net worth of $1,200,000.00, the Supreme Court limited the alimony obligations imposed upon him and made the following pertinent observations:

> "The custody of the daughter Michele, now three years of age, is of course properly with the plaintiff and the $200.00 per month is a suitable award for her support. In view of the defendant's comparative affluence the property settlement of $15,000.00 is likewise appropriate; and there no particular reason to disagree with the return of the $9,500.00 diamond ring. However, the award of $250.00 per month alimony on an indefinite basis we believe is not justified. This was a misadventure in marriage for both parties and was of comparatively short duration. The plaintiff is a young woman with a life expectancy of over thirty years so that award could amount to many thousands of dollars. It is true that she does have the responsibility of being a mother to Michele. Yet she had been married before

and has other children. The actual care and support of Michele is presumably compensated for by the $200.00 per month. Further, it should not be assumed that the plaintiff is or will remain helpless. She held a responsible position prior to this marriage. It is our opinion that under all of the circumstances shown equity and justice will be served by placing some reasonable limitation upon the award of alimony and that after a period of two years it should cease."

The Barrett decision and the other foregoing cases all require that this court carefully evaluate the needs of plaintiff. In doing so, the following should be kept in mind:

In July of 1976 plaintiff submitted a list of her monthly expenses to Judge Conder in a prior hearing in this case. The total of those monthly expenses as she itemized them on that list came to $598.00.[44] However, just a few months later when the trial of this case actually commenced, plaintiff submitted a new itemization of her monthly expenses.[45] On this list plaintiff claimed her monthly expenses were $842.00. Obviously, there is a $244.00 per month discrepancy between plaintiff's two evaluations of her necessary monthly expenses.

There can be no question but that plaintiff's second itemization (Ex. No. 16) is grossly inflated. For example, she valued her monthly telephone bill at $45.00, when she testified that her flat rate was merely $13.50 per month.[46] She itemized her Mountain Fuel gas bill as $60.00

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44 Red TR. p. 68; Green TR. p. 56; D. Ex. No. 29.

45 P. Ex. No. 16.

46 Red TR. p. 66.

per month, and yet her very own exhibit (P. Ex. No. 34) reveals that she only spent an average of $22.54 per month on gas. Plaintiff estimated her monthly medical and dental expenses to be $50.00 and yet also added an additional $30.00 per month to pay for medical insurance. Obviously, plaintiff is trying to claim a double expense for precisely the same item, since her medical insurance should cover the bulk of her potential medical and dental bills. It is also very interesting to note that even though plaintiff does not have a job to which she must drive to and from each day, she nevertheless budgeted $100.00 for gasoline and maintenance on her automobile. This is in sharp contrast to the $50.00 gas and maintenance expenses which she had estimated but six months previously.[47] Plaintiff was also extremely lavish with her own individual expenses. In her latest listing of expenses,[48] she budgeted $265.00 per month for such things as clothing, art and pottery classes, and entertainment.

It is painfully obvious from the aforementioned discussion that plaintiff is seeking to reap a windfall from her brief marital sojourn with defendant. Defendant submits that plaintiff tried to be fairly reasonable in her first itemization of living expenses ($598.00) but was totally unreasonable and avaricious in her second itemization ($842.00).

Furthermore, when evaluating plaintiff's needs, one must consider

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47 D. Ex. No. 29.

48 P. Ex. No. 16.

the fact that she is a relatively young, able-bodied woman who is trained and licensed as an expert medical technician. She should have absolutely no trouble whatsoever in obtaining gainful employment to supplement her alimony. The Utah cases have all taken this factor strongly into account in evaluating what the wife's potential needs are.

B. Short Duration of Marriage.

There are many Utah cases which forcefully establish that when the duration of a marriage is relatively short the plaintiff-wife is not entitled to a substantial award of alimony. For example, in Frank v. Frank, Supra, the husband brought an action for divorce but the trial court entered a decree of divorce for the defendant-wife on her counterclaim. The trial court awarded the wife alimony in the sum of $200.00 a month for three years. The wife appealed this alimony award contending that it was inequitable. The Supreme Court in rejecting appellant's contention held that the record including the fact of the short lived marriage supported the three year $200.00 a month alimony award. The court stated:

> "We think that the trial court arrived at an equitable conclusion in case of a very short lived marriage. The record indicates that on believable evidence the other party was in a very much different position financially before and after the fortunate or unfortunate walk to the alter."

In the landmark decision of Pinion v. Pinion, Supra, the trial court granted the wife a divorce from her husband after four years of marriage. The court gave

her $55.00 a month alimony with no fixed cut-off period. The husband appealed contending that the trial court had abused its discretion. The Supreme Court agreed with the husband and reduced his alimony obligation to a lump sum payme of $2,000.00. In support of its holding, the court stated:

> "As a general rule a young couple, married a short time, who break up with no children, would call it a misadventure in matrimony, and unless the wife has suffered more than the ordinary wear and tear of matrimony, or stands by the divorce to lose substantial material benefits in economic status or loss of inheritance, no alimony ordinarily will be given. . . .
>
> "As to the age when they part company. She is 44. That and the fact that she was married four years would ordinarily entitle her to a substantial portion of his property if the interruption of her former career by marriage left her materially worse off in opportunity as compared to where she might have been had it not been for the interruption, or the opportunity or ability for readjustment had materially suffered. Otherwise, four years out of one's life well supported, with a return to singleness, cannot necessarily be counted as a detriment." [Emphasis added]

In the instant case, plaintiff cannot count her marriage to defendant as a detriment. She is not now materially worse off than she was prior to their marriage. On the contrary, she is in a much better financial position now considering the generous property award which the trial court granted her.

Schuster v. Schuster, Supra, is a final case which bears consideration. In that case, the marriage duration was slightly less than four years. Both parties had children from prior spouses, but there was no issue born to their marriage. Both spouses were middle aged. The trial court granted the wife a

divorce. However, she appealed seeking that her alimony award be increased to $95.00 per month. The court refused to do so, stating:

> "Considering, however, the comparatively short duration of the marriage and the probability that the plaintiff may be able to increase her independent income which, she testified, was reduced by reason of the marriage, we are of the opinion that the total amount of alimony should be fixed at the sum of $1,500.00, and when this amount has been paid the defendant should be relieved from payment of further sums of alimony."

C. Permanence of Award.

Not only is the amount of the award excessive, but the permanent nature of said award makes it intolerable. One of the trial court's objectives in granting a divorce is the "eliminization or minimizing of frictions or difficulties in the future". DeRosa v. DeRosa, 19 Utah 2d 77, 426 P.2d 221 (1968). Recognizing this as an objective, trial courts are usually loathe to grant permanent alimony awards, since such awards create continual friction and interaction between a former husband and wife. See, for example, Christensen v. Christensen, 21 Utah 2d 263, 444 P.2d 511 (1968). In the instant case, plaintiff's award of permanent alimony can do nothing but ignite an already explosive situation.

It is also very instructive to note that very few Utah cases have ever awarded permanent alimony. In almost all Utah cases the alimony award extends for a certain finite period, such as two or three years. Often when the trial court has attempted to indefinitely extend alimony, the Supreme Court

has shortened the period. Wilson v. Wilson, Supra; Pinion v. Pinion, Supra; Porter v. Porter, Supra.

D. Defendant's Suggested Remedy of Alimony Inequity.

Defendant does not suggest that plaintiff be left without any alimony at all. Rather, defendant suggest that plaintiff be granted alimony in the sum of $650.00 per month for a three-year period. Such an award would comport with the trial court's order of temporary support in this case, which was rendered on July 14, 1976. Pursuant to the provisions of that order, defendant was required to pay plaintiff the sum of $650.00 per month as temporary alimony. Such an amount is ample to provide for plaintiff's rather luxurious needs (P. Ex. No. 29). This is especially true since plaintiff could use her share of the proceeds from the sale of the condominium to purchase a new residence outright. Thus, she would not be required to make any mortgage or rental payments.

Three years should give plaintiff ample time to obtain gainful employme and readjust her life to new circumstances. Moreover, plaintiff's children are already for the most part self-sufficient, and in three years they will undoubtedly be even more so. Therefore, defendant submits that a three-year award of alimony at the sum of $650.00 per month is totally adequate to provide for plaintiff's needs and allow her to live at the standard of living to which she has become accustomed.

CONCLUSION

In light of the circumstances in this case, the total dollar value of plaintiff's property award and her permanent alimony award in the sum of $900.00 per month are both extremely excessive. Had plaintiff and defendant been married for twenty-five or thirty years, had they had numerous children, had plaintiff been totally incapable of obtaining any gainful employment, had plaintiff contributed substantial assets to the marriage, and had defendant not adequately provided for the needs of his family during the tenure of the marriage; the situation presented by this case might be vastly different. However, none of those vital factors are present here. Plaintiff possessed practically no assets when she entered into her marriage with defendant. Everything which was acquired during the marriage was acquired solely as a result of defendant's efforts. The marriage was of very short duration, lasting only six years and seven months. No children were born as a result of this marriage. Plaintiff never worked to help support the family, even though defendant suggested it on numerous occasions. Finally, defendant was a very generous provider to both Mrs. Wilson and her two children by a previous marriage. As a result thereof, both Mrs. Wilson and the children were able to acquire substantial and valuable personal property which otherwise they would not now possess.

Defendant desires to be fair and wants to provide plaintiff with

the necessary means to accustom herself to a new life. It is submitted that plaintiff's suggestions -- sale of condominium with a division of the proceeds and reduction of alimony to $650.00 for three years -- will accomplish this purpose and yet will cure the glaring inequity which now burdens him as a result of the trial court's judgment. Pursuant to the foregoing discussion, defendant, therefore, respectfully requests that this court modify the trial court's decree and grant defendant relief as prayed.

Dated this 16 day of December, 1977.

Respectfully submitted,

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